2 June 2017

EE RESPONSE TO OFCOM CONSULTATION: "ELECTRONIC COMMUNICATIONS CODE"

Overarching comments

EE views the new Electronic Communications Code (ECC), brought forward by the Digital Economy Act, as a step forward in supporting the deployment, upgrading, sharing and maintenance of mobile infrastructure.

The new ECC provides Code Operators with greater rights over land and better reflects the fundamental shift in importance of mobile connectivity over the three decades since it was first introduced. We plan to use these new rights appropriately and responsibly, recognising that positive and robust relationships with site providers will remain essential to the effective functioning and expansion of our network. However, we believe a number of important changes to the draft Code of Practice and a different approach to the publication of standard terms are needed to ensure that they can best support these relationships and the policy objectives of the new ECC. We address these in our answers to the consultation questions below.

We fully endorse the consultation responses from MBNL (a joint venture between EE and H3G) and Mobile UK (of which EE is a member).

The consultation document also recognises the concerns of mobile network operators that the new ECC no longer confers rights over telecoms infrastructure, meaning that for a significant proportion of mobile sites (principally operated by Wholesale Infrastructure Providers), it is unclear at best as to whether and how access is regulated.

Whilst the consultation document suggests that Ofcom may be able to draw powers from the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 and the Communications Act 2003, it does not provide a level of detail that provides us with full confidence that Ofcom is both able and willing to intervene in this market if necessary. We would therefore welcome a more detailed explanation as to when Ofcom would intervene and the process it would follow in assessing concerns. We believe this is a necessary step in ensuring commercial negotiations have a suitably robust regulatory backstop.

Q1: Do you have any comments in relation to the scope or drafting of the Code of Practice, as set out in Annexes 4 and 5?

We broadly support the draft Code of Practice and view it as a helpful document in promoting effective Code Operator-landlord relationships and setting down good practice markers for the behaviour of both sides before and during agreements.

However, we would welcome clarification on the status of the Code of Practice and if/how Code Operators and land owners will be expected to confirm their support for it. To this end, we believe an additional section should be added to the introduction making clear its status, confirming it is non-binding and voluntary and does not form part of any contractual arrangement between Operators and landowners, although tribunals may take into account parties' compliance when assessing cases brought before them.

We also note the fact that this Code of Practice was the product of extensive and successful discussion and negotiation between a large number of stakeholders, including Operators, infrastructure providers and landowners. We would therefore argue that no further major changes are either necessary or desirable – it must be a document that can command the support of all sides and the negotiation process and outcome demonstrated this to be the case.

Mobile UK's response to this consultation sets out a number of these potential areas and reiterates the industry view set out during negotiations. We fully support the points made here and should other parties wish to reopen issues that were agreed during stakeholder discussions, we would hope that this would not carry any weight with Ofcom. However, if Ofcom is considering further changes following this consultation process, it will be vital that the implications of any changes are discussed and agreed within the original drafting group before changes are incorporated.

Q2: Do you have any comments on the scope or drafting of the standard terms, as set out in Annex 6?

Ofcom has interpreted its duty under the new ECC to prepare and publish standard terms which may (but need not) be used in agreements as a requirement to produce, in effect, a standard agreement. It has also decided to only publish one set of standard terms for potential application across all potential Code agreements, fixed or mobile.

We believe that such an approach will do little to support the new ECC and, more likely, risk timely and successful negotiations between operators and site providers:

- A single set of standard terms is likely to be of very limited use in practice, principally due to the very different requirements for fixed and mobile sites, and the requirements of individual sites themselves. We have a number of major concerns, set out below, with the drafting of the standard terms in the consultation document; as a result, from our perspective, they are rendered unusable.
- The fact that these terms are Ofcom-endorsed is likely to mean that some site providers will be reluctant to consider amendments.
- It fails to recognise that there are ongoing discussions between industry and landowner representatives to agree template agreements for a range of mobile sites that will be substantially more fit-for-purpose than the Ofcom standard terms.

We believe that the requirement under Paragraph 103(2) in the new ECC can instead be interpreted as a duty to prepare and publish some standard clauses, rather than a near-full standard agreement. A more effective approach would therefore be for Ofcom to produce some standard Heads of Terms that parties may choose to adopt as a reference point for agreeing a comprehensive Code agreement. This would have the benefit of ensuring all sides are aware of the key areas any agreement should cover, but not attempt to draft the detail.

Should Ofcom agree with this approach, we would be happy to work with it and other stakeholders to develop these standard Heads of Terms.

Should Ofcom disagree and continue the approach of producing a single standard agreement, then we would urge it to proceed very carefully. Ofcom should:

- Make very clear to Operators and Grantors that the standard terms are an attempt to provide a one-size-fits-all approach but are highly unlikely to be suitable without significant variation to reflect site and infrastructure specifics and that parties can and should negotiate amendments.
- Publicise the fact that other template agreements have been or may be agreed between industry and landowner representatives for mobile infrastructure that will provide a better basis on which to begin negotiations than the standard terms.
- Amend the draft standard terms significantly. The response submitted by MBNL sets out a number of areas where change is needed – these points are largely reiterated below and we would draw particular focus to resolving the significant concerns regarding Clause 10, Termination.

Clause 1:

- "Land" is not particularly well-defined and it is not clear where there is a separation between land occupied by the Operator and the land which is owned and retained by the landowner. This would be of concern in relation to an Operator's greenfield macro sites in particular where the Operator would want to fence the site off and control rights of access by third parties including the landowner and any other occupiers of the residual land. As a consequence of the drafting the rights granted over 'Land' may be better suited to the installation of fixed line apparatus rather than mobile telecoms.
- The definition of "Term" is such that the agreement runs indefinitely until it is terminated. We suspect that many landowners will have a problem with that since they would usually want to grant the rights for a specific fixed term, with successive renewals thereafter. It is a way of them feeling that they have more control over their assets. This drafting is also at odds with Paragraph 11(1)(c) of the ECC which states that an Agreement must state for how long the code right is exercisable. Additionally, Operators require some certainty over occupation in order to plan network coverage and upgrades across many interlinked sites and also to amortise the considerable cost of investment. Therefore, Operators are likely to want to see some certainty as to the minimum period of occupation before entering into or renewing an agreement.

Clause 2:

- 2.1(c) – we would expect that the Agreement would contain a right to "remove" the Apparatus (in addition to the obligation to remove it in clause 10.4 of the Draft Standard Terms) as Paragraph 4.9 of the Code of Practice states that Landowners and Operators should be clear on the position relating to the decommissioning of sites that are no longer required.
- 2.1(f) is a general right to enter onto the landowner's land; it does not specify nor provide for agreement of any particular access route. This is unusual and could cause problems if the landowner wants to restrict (as we would expect) those areas which the Operator can access. Certainty is also helpful for the Operator. On Greenfield sites we would usually expect a specific access route to be stipulated.
- 2.1(g) is a general right to connect the Apparatus to a power supply. It does not differentiate between an independent supply and the right for the Operator to tap into the landowner's supply, nor are there any provisions as to how any shared supply might be paid for. This will be problematic on those sites were a shared supply is used. We would further expect a provision relating to the right to use a backup power generator and the right to lay communication links.

Clause 4.1(a) introduces a seven-day notice period for access which is neither provided for in the ECC nor the Code of Practice. Practical arrangements for access to a site should be agreed consensually between the parties and the terms should not provide for a seven-day notice period as the default position.

Clause 5.1(c) allows the landowner to give "reasonable prior written notice to the Operator of any action it intends to take that would or might affect the continuous operation of the Apparatus", and this includes interrupting the power supply. This is derogation from grant and could be highly disruptive to the Operator. We would expect it to contain caveats or controls to protect the Operator and by giving the landowner a clear right to take such action. It is of concern that this may cause disruption to the continued operation of the Apparatus.

Clause 7.3 should be removed from the standard terms. The ECC should be viewed as a baseline for Operator-landlord agreements, with parties looking to secure terms that will often go above and beyond rights set out in the legislation. Clause 7.3 could cause confusion in this regard as well as being unnecessary given that the ECC (paragraph 100) will act as a backstop to new agreements but does not prevent the negotiation of broader rights.

At clause 10.1(c) (Termination), there is a right for the landowner to terminate the agreement if they intend to redevelop their land. We believe that the ECC envisages such provision to be exercisable at the end of the term or subsequent to it, but the absence of a fixed term (or minimum fixed term)

and per (Paragraph 11(1)(c) of the ECC), such a provision is at odds with the ECC and consequently should not form part of a draft Agreement.

As the Agreement is currently drafted without a Term, the effect of this break right as drafted is to make it exercisable at any point. Operators will have no certainty of occupation. Operators and infrastructure providers would accordingly find it difficult to plan long-term network coverage which in turn makes it difficult to justify investment into existing and/or new sites with such limited certainty; the period over which they would be able to amortise their investment would be too short. We believe that such a clause goes beyond the remit of the ECC and should not be included in any draft terms proposed by Ofcom.

Further, there is no separate termination provision which could be triggered with immediate effect if the Operator lost its operating licence (or entitlement to operate a network) or if the relevant building, structure or land was destroyed or damaged to such an extent that the site could no longer operate.

Further, at **clause 10.1(d)**, the proposed termination clause incorporates the public benefit test which the Court will use when it is deciding whether to grant an Operator the rights or not. If it appears in an Agreement, in the manner Ofcom proposes, it essentially means that the test, which would otherwise only be applied by the court either prior to deciding to order the grant of code rights (paragraphs 19/20 of the ECC) or at the end of a contractual term (paragraph 31(4)(d) of the ECC), would have to be applied continuously throughout the term of a negotiated agreement. This is not the intention of the ECC. This would place an onerous burden on the Operator to rebut the Grantor's assertion that the Grantor cannot be compensated by money and the public benefit is outweighed by the prejudice the Grantor suffers at any point during the term. It also gives no certainty to operators as to how long sites will be available and providing coverage which impacts network planning and, as already discussed above, associated network investment.

A good deal of technical evidence and the input of expert witnesses would be necessary to rebut those assertions adequately. This process is understandable in the context of a court process relating to the initial imposed grant of the rights, or the renewal of the rights at the end of a fairly long contractual term, where operators would be given months to prepare evidence. However, the application of the test certainly does not work when the Operator only has thirty days from service of a notice to prepare its case and nor does not appear relevant or suitable where the parties have willingly entered into the Code agreement, particularly where that agreement has a fixed term as we have recommended above.

Additionally, irrespective of when the break at 10.1(c) and 10.1(d) can be relied upon (at the end of a fixed term, or more worryingly during it), it seems nonsensical to impose a ground for termination in a draft agreement which mirrors the ground for termination in the Act. That is because, technically, the parties would have to debate whether the ground applies twice: first, in the thirty day termination period of the Agreement and, once again, in the far longer period under the Act.

Q3: Do you agree that Ofcom has identified all of the notices it is required to prepare under paragraph 89 of the New Code?

Q4: Do you have any comments on the scope or drafting of these notices as set out in Annex 7?

We fully endorse the comments and points made by MBNL in its response to the consultation.

We agree with Ofcom's statement that it has on the whole prepared a comprehensive set of draft notices. The only two notices which they have not drafted are those under paragraph 31(1) (Operator's counter notice to a hostile termination notice) and paragraph 38(4) (Operator's response to a request for information regarding code rights). However, Ofcom has noted that there is little value in preparing prescribed forms for these counter notices as the Operators are able to

prepare their own notices, and the information contained within those particular counter notices may vary.

In that respect it is interesting to note that Ofcom have nevertheless gone on to prepare prescribed counter notices for use by operators in other situations (for example the counter notice under paragraph 52(2), being the operator's objections to a transport operator's alterations requirements). We are therefore not clear why it felt that was necessary, unless it was to ensure that all of the prescribed information was included in the response.

Part 15 (Paragraphs 86 to 90) of the new ECC contains fairly detailed provisions relating to the preparation and service of notices. In particular, Paragraph 87 states that, even where the form of notice is not prescribed by Ofcom, any notice given under the ECC by the operator must explain:

a. the effect of the notice;
b. which provisions of the ECC are relevant to the notice; and
c. the steps that may be taken by the recipient in respect of the notice.

It is expressly provided that Operators must use the notices (if any) prescribed by Ofcom and, in respect of any other notices (where there is no prescribed format), an Operator's notice must comply with paragraph 87(1) above, failing which the notice will be invalid. However, it is always open to the recipient to accept the validity of the notice.

The ECC takes a slightly different approach in the context of notices given by parties other than the Operators. In the context of other parties' notices given under paragraphs 30(1), 32(1), 38(1) or 39(2) that notice must be in the form prescribed by Ofcom (albeit that an Operator can choose to accept an invalid notice). However, other notices served by parties other than Operators not served in the prescribe form may still be valid, albeit that the party serving the notice could face cost penalties.

There are further provisions (Paragraph 90) requiring service by a registered post service or by Recorded Delivery and detailing how notices should be addressed.

It would be helpful if all the prescribed notices had a clear section at the top of each notice which sets out who the notice is from and who it is being sent to (and these addresses being addresses for service for future notices), i.e. in the format:

> *To: Operator/Landowner (name and co.no.) as appropriate*
> *Of: [address] Please quote formal Address for Service*
> *From: Operator/Landowner (name and co.no.) as appropriate*
> *Of: [address] Please quote formal Address for Service*

Whilst some of the notices require this information to be provided in the main body of the notice, some do not require it at all and certainly do not set out the sender's details, which for notices that require a counter-notice or response to be served means the recipient does not always know where to send a response.

Whilst the new Act sets out statutory provisions for where notices should be served (see Paragraph 91), this does refer to the "proper address of a person" being the address that was given to the other party for service.

Often agreements refer to register office addresses (which may be fine in some instances and thus will be the correct address to use) but these often change later down the line from that originally stated in an agreement and, for landowners, they may not have a registered office address at all, so it would be beneficial for the sender's name and address for service to be included so the recipient knows exactly where to send a response if one is required otherwise there is a risk a Landowner could be served at a site where they do not ordinarily receive and process post.